APPEAL NO. 92158

On March 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. Ms. D determined that the claimant, (claimant), the respondent herein, sustained injuries on (date of injury), in the course and scope of her employment busing tables for (employer), and that as a result of such injuries she had a disability and was entitled to payment of benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer found that the compensable injuries leading to disability were sustained to respondent's ankle, both knees, right leg, back, and neck.

The appellant argues three major points of error: that there was insufficient probative evidence to support the hearing officer's finding that respondent sustained a compensable injury on (date of injury); that there is insufficient probative evidence to support the conclusion that respondent sustained disability as a result of the various enumerated physical injuries; and that the findings that disability resulted from injuries to respondent's neck, ankle, or right leg are outside the issues framed by the benefit review conference report. Respondent responds that the decision of the hearing officer is supported by a preponderance of the evidence.

DECISION

We find no error in the hearing officer's findings and conclusions that an injury occurred in the course and scope of employment. However, we reverse a portion of the hearing officer's decision concerning the period of disability caused by such injuries, and render a decision, based upon the evidence contained in this record, that the period of disability after the injury was from (date of injury) up to and including February 15, 1992, but not thereafter.

The respondent testified that she lived with her grandparents and her two children, who were 11 months and 3 years at the time of the hearing. Prior to accepting a job with the employer, respondent's only work experience after leaving high school had been babysitting for her niece and nephew and housecleaning for her uncle. She stated that she started working for employer in early November 1991. For transportation, she relied upon her grandparents or coworkers. Her work hours were 10:00 a.m. to 10:00 p.m., four days a week, with generally two hours off during the day for breaks and meals. She employed a babysitter to watch her children while she was at work.

Respondent testified that the Tuesday before Thanksgiving[1], when she was either off work or on a break, she hit a lady's bumper while driving her uncle's car. According to statements by two coworkers that were admitted into the record, the respondent stated she hit her accelerator, rather than the brake, and rear-ended another car. Respondent stated

[1] Although the decision refers to the date of the car accident as "on or about November 25, 1991", the Tuesday before Thanksgiving was November 26, 1991.

that neither she nor her uncle were injured as a result of this accident, nor did she seek medical treatment. Respondent stated that she was not covered by insurance for this accident. She went to work the next day, a Wednesday, and stated that she did not lose time from work due to this accident.

Respondent's main supervisor was (Mr. B), one of several managers for the employer. Respondent testified that she had been having problems with her babysitter, although the exact nature of these problems is not fully described. Respondent stated both that she did not have a steady babysitter, and that she would occasionally be called by the sitter to go home "for my little girl." In any case, respondent testified that due to the babysitter problems, Mr. B called her in his office the Wednesday after Thanksgiving, and stated that she would be taken "off the clock" until she could get her personal problems straightened out. Respondent stated that she showed up the next day, told Mr. B she had her problems worked out, and worked that day. On Friday, December 6th, respondent stated that she arrived at 8:30 a.m., but clocked in "like exactly 10:00 o'clock." Very shortly thereafter in her testimony, she stated that she clocked in at 10:30 a.m., and the accident happened at 1:30 p.m. She stated that she told a coworker she was going to the restroom, and walked back through the dishroom, where she slipped on a knife on the wet floor near the dishwashers and fell between a table and a dish table. Pictures were offered of a coworker in the position she fell. According to the record, her foot went under the table, which has a low rail, and her back and head struck against the higher dish table. She stated that she hit her ankle on the table. She was assisted up by Mr. B and other coworkers, and led to the storeroom where ice was put on her knee and ankle. Although no one witnessed the fall, several people observed her sitting on the ground. Respondent said her stockings were torn in the fall; however, this was refuted in several coworkers' statements. Respondent said that her neck and back did not hurt her after the accident; this was corroborated by several coworkers, who said she complained only about her knee and/or ankle. Notwithstanding the findings of the hearing officer that respondent suffered injuries to both knees, respondent's testimony was that she did not injure both knees, but only her right knee.

Respondent stated she went home, and that her neck and back began to bother her the next day. She said she consulted (Dr. V), a chiropractor, on December 11th, about all of her injuries. An initial medical report signed by Dr. C (apparently on behalf of Dr. V) for this visit indicates that respondent is diagnosed with acute, post-traumatic severe cervical disc syndrome, cervical strain, and lumbar disc syndrome. The medical report makes no notations about her leg, knee, or ankle. The report indicates, for anticipated dates that the employee may return to full-time work, a time frame of 30-60 days. Respondent testified that she at first saw Dr. V on a daily basis for treatment. However, she stated that her last visit with Dr. V was December 27th, and that the appellant thereafter refused to pay for further treatment.

Respondent stated that she had not sought employment since December 6th. She said that she continues to be bothered by pain in her ankle, and in her neck "off and on."

Respondent's document of termination, signed by her, indicates that she agreed to her termination, and the reason given on the form is "did not show for work because she had to move from the area." On cross-examination, respondent was asked if she recalled the reason she gave for accepting the termination. She answered: "The reason why I figure because I was having problems with my kids and [Mr. B] needed somebody to always be and do his work. And I had explained to [another manager] that I needed time with my kids if they called me because you never know if my kids get sick. So I had to go that day."

Although the hearing officer recited (in her statement of the evidence) that respondent was unable to lift her child, respondent actually testified that she had neck pain when she picked up or pulled around her little girl. Respondent testified that she moved around her house a lot checking on her children. She stated that her ankle swelled on occasion, the last such occasion being the Saturday before the Friday contested case hearing. Respondent attributed her inactivity for seeking employment to Dr. V's "report" as well as her subjective impression that she didn't think she could work. Respondent testified that, with regard to looking for a job, "I got it in mind looking for one as soon as everything gets settled."

(Mr. N), Assistant Manager for employer, conceded that the floor in the area where respondent stated she fell could have been wet, and that it is a normal occurrence for water to be on the floor next to the dishwasher. Mr. N stated that the day of the accident, the store had just opened for business, so the floor was still clean. He stated that employer had a safety policy of rewarding employees with a small bonus if a certain number of accident-free days were achieved. Mr. N indicated (as do some of the written statements in the record) that respondent had accepted a job with another (employer's) location and was supposed to start at that location on December 6th, and that a manager from that other location called employer to locate respondent. He stated that respondent's time card showed she clocked in on December 6th at 11:30 a.m., and he said that the accident happened at 11:45 a.m. Mr. N stated that respondent, after the accident, complained only that she hurt her ankle.

A recorded (but not sworn) statement from (Mr. Y), associate manager at (employer's), states that respondent reported early in the morning to his location on December 6th. She stated she was no longer employed by employer, and needed only to go pick up her paycheck. Mr. Y indicates that respondent was instructed to return to his location by 11:30 a.m., but never came back. He stated that he called employer and found that she was still on their payroll. He stated that he talked to respondent at 5:00 that night, and she told him that she had car trouble, and that she denied she had worked for employer that morning. She never reported for work at his location. Respondent denied that she had been at (employer's) on December 6th, but stated she had been there on Thanksgiving and the next Saturday.

A number of sworn or recorded statements were admitted, and, while those from

coworkers state that the declarants did not see respondent's accident, there are no facts developed to put the declarants within the immediate vicinity of the accident. Thus, statements that the accident was not witnessed are of limited probative value, especially in light of the statements of several persons that they did see respondent sitting on the ground by the dishwasher, and that she was assisted to her feet.

I.

We find no merit in appellant's contention that the hearing officer has gone beyond the scope of the issues raised in the benefit review conference report. The issues as stated in the report are: "whether the claimant sustained an injury within the course and scope of her employment or if the incident was faked and injury is a result of an automobile accident" and "whether the claimant sustained an injury to both knees and back of which she is disabled or whether her only injury was to her knee of which there is not any disability." The statement of the carrier's position describes the content of Dr. V's medical report that cites an injury to the cervical area (the neck).

At the contested case hearing, Dr. V's medical report was admitted without objection. When testimony was developed as to the extent of the injuries, appellant did not object that this was beyond the scope of the issues before the hearing officer. In any case, we believe that the issues, as stated, are broad enough to support inquiry by the hearing officer into injuries beyond the knee and the back.

II.

After reviewing the evidence concerning whether an injury occurred on December 6th, and agreeing that the evidence could support a finding that the auto accident was the likely cause of injury, we nevertheless find that there is sufficient evidence to support the determination of the hearing officer that the respondent sustained an injury on December 6th in the course and scope of her employment.

The decision of the hearing officer should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The evidence supporting her decision on this issue is not so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The fact of an injury may be established solely through a claimant's testimony. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). The formal rules of evidence do not apply to contested case hearings under the 1989 Act. Art. 8308-6.34 (e). A hearing officer may thus admit and consider signed or recorded hearsay statements tendered by the appellant (and not objected to as hearsay), as well as testimony which may impeach such statements. There is no indication in the record that the determining factor in the decision for respondent

on the "course and scope" issue was influenced by respondent's recitation of a conversation with one of the coworkers who supplied a statement.

We affirm the decision of the hearing officer with respect to the first issue before her, and note that this finding supports an award of health care reasonably required to treat the compensable injuries.

III.

Temporary income benefits, unlike medical benefits or impairment income benefits, accrue on the eighth day of "disability" following a compensable injury, and are paid to a person who has disability and who also has not attained maximum medical improvement. Art. 8308-4.22; 4.23(a). As this tribunal has noted before[2], the 1989 Act has changed the concept of "disability." As defined in Art. 8308-1.03(16), disability means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." In other words, a claimant must be able to show a causal connection between diminished wages and the compensable injury.

The appellant complains of the hearing officer's determinations of the disability issue, which is set forth in Finding of Fact No. 7 and Conclusion of Law No. 4:

FINDING OF FACT No. 7:Claimant has not worked anywhere since (date of injury), and still complains of ankle pain, difficulty in walking, and now and then neck pain.

CONCLUSION OF LAW NO. 4:Claimant sustained compensable injury to her ankle, both knees, right leg, back, and neck which resulted in disability.

After careful review of the record, we believe that the conclusion and decision, to the extent that they hold that disability continued up to the date of the contested case hearing, are against the great weight and preponderance of the evidence so as to be manifestly unjust. We do find that there is sufficient evidence in this record to support a

conclusion of the existence of disability from the date of the injury up to and including February 15, 1992, for reasons explained herein.

This body has adopted a standard of review concerning questions of sufficiency of the evidence that it will not substitute its judgment for that of the hearing officer unless the great weight and preponderance of evidence is against the decision, such that it is clearly

[2] See Appeals Panel Decision No. 92064 (Docket No. FW-91-068079-01-CC-FW41), decided April 3, 1992.

wrong or manifestly unjust. This does not mean that probative evidence in support of the verdict must be wholly lacking. As stated by the Texas Supreme Court in oft-cited In re King's Estate, 244 S.W.2d 660 (Tex. 1951), at p. 661, it is the duty of the Court of Civil Appeals, in considering a question of sufficiency of the evidence,

"to consider and weigh all of the evidence in the case and to set aside the verdict .... if it thus concludes that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust- this, regardless of whether the record contains some "evidence of probative force" in support of the verdict."

The Court further discussed this standard of review in Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Instances where a verdict should be set aside as against the great weight and preponderance of the evidence include those which shock the conscience, are clearly unjust, or clearly indicate bias. The Supreme Court noted that the reviewing court would necessarily follow the same mental process that a jury would, and, although the Court of Civil Appeals could not find facts, it could "unfind" facts. In order to discuss the quality of the evidence of disability in this case, we feel it is most fair to set out the entire testimony from respondent relating to the disability issue.

ON DIRECT EXAMINATION OF CLAIMANT BY HER ATTORNEY:

Q:Have you worked anywhere since (date of injury)?
A:I have been home sitting down.

Q:Tell the commission, do you have any problems today as we sit?
A:Yeah, like this morning, I got up, and my ankle, the bones on the side was hurting me. Some mornings, I get up, it hurts that I have to, you know, walk around the house with my tennis shoes on, you know, on one foot.

Q:Have you had any other problems?
A:So far, about taking care of my kids, yeah, that's it.

Q:How about your neck? How has your neck been feeling?
A:It hurts now and then.
[Hearing officer asks for answer to be repeated and it is]
Q:Do you have good days and bad days?
A:Yes.

Q:Tell the commission what a bad day is like when you start having pain in your neck.
A:The bad days is what I am feeling, when I am hurting and I have to pull around my little girl and more pressure is on my neck, you know, picking her up and stuff. It hurts.

ATTORNEY:I will pass the witness.

The insurance carrier did not cross-examine at this point, but subsequently recalled respondent, where the following testimony on the disability issue was elicited:

Q:Okay. So there is not an injury to the left knee?
A:No. It's my right.

Q:Okay. What's bothering you now? Is your ankle bothering you?
A:Yeah. It's bothering me, and my neck and stuff, yeah.

Q:How often does your ankle bother you?
A:It's like when I stand on it most of the time, it hurts, and it never did that before.

Q:Have you had any treatment for the ankle at all?
A:[Dr. V] be treating me.

Q:Doctor Who?
A:[Dr. V].

Q:He is treating your ankle?
A:He was-They told me to put some ice pack on my ankle and stuff.

Q:Does it swell?
A:No. Sometimes it just hurts, the bone hurts me.

Q:Where?
A:Down here and, you know, it hurts around. My grandmother puts some Vick's or rubs it with alcohol and puts a bandage on it for me to go to sleep.

Q:When was the last time it hurt?
A:Last week, last Saturday.

Q:What made it hurt last Saturday?
A:What made it hurt?

Q:Uh-huh.
A:Because last Saturday, I got kids at home. I walk around back and forth checking on my kids when they are outside and stuff.

Q:And other than that-when was the last time you had to put ice on it?
A:I put ice there every now and then when it hurts, I get an ice pack and put ice on it.

Q:Did [Dr. V] ever do x-rays of the ankle?

A:He did x-rays on my back and stuff, my waist, yes.

Q:Did he do x-rays on your ankle?
A:Well, I don't know. They was taking x-rays. I didn't see him, I guess. I was standing up when he was doing it. So I don't know if he got one.

Q:Okay. What's the problem with your knee now?
A:The problem with my knee, like I just said, it hurts, yeah.

Q:What makes it hurt?
A:By me-I don't know because I got hurt at work. It hasn't been the way it used to be. It gets sore.

Q:What makes it sore? What do you do that makes it sore?
A:I move around in the house a lot checking on my kids, and that makes--if you have somebody running around, walking around the house checking on their kids or doing something and your bone, your bones is hurting more, that would make it swollen more.

Q:Is it swollen now?
A:It's not-I can't tell right now because under-one of the bones is just hurting.

Q:How about your knee? Is your knee swollen now?
A:My knee, it's not swollen. It hurts, though, but it's not swollen.

Q:When was the last time it swelled up?
A:It was, like I said, last Saturday. Every now and then, I put ice packs on my leg and stuff.

Q:I thought we were talking about your ankle earlier when you said last Saturday, did both of them swell?
A:I took the ice pack and I go for a few minutes on my ankle and a few minutes on my knee, you know. And then my grandmother do it the old fashioned way, Vick's and alcohol. That kind of-I am hurting and it burns for a while and calms down.

Q:Have you applied for work anywhere since December 6th?
A:No.

Q:Why not?
A:Well, [Dr. V] told me to wait a while, to just wait a while and see how far, your know, my back would go and how far I would be taking his treatment and stuff, but . . .

Q:When was the last time you saw [Dr. V]?
A:It was after-it was since New Year's since I seen him because I went back there, and he told me I can't come back until the insurance company paid their bills and stuff like that.

Q:So you haven't seen him this year?
A:I haven't seen him this year, no.

Q:Okay. And you haven't made any attempt to find work?
A:I can't work right now because I am on [Dr. V's], you know, doctor's report, and I can't go to work. I can't find a job right now.

Q:You can't find a job right now?
A:I can find one, but I am not able. I am, you know, hurting and I am not going to go ahead and find one and start hurting myself more.

Q:I thought you testified originally that it hurts occasionally. You don't think you could work?
A:That's what I just said. I can't go back and find a job, if I get hired to go to work and then later on *I start hurting then*[3] I have to get off from work and go home and then lost that job, no.

Q:Then you haven't attempted to even look for a job? Or you haven't taken a job?
A:I got it in mind looking for one as soon as everything gets settled.

Q:Have you made an application for a job with anybody?
A:No.

[At this point, appellant's attorney passed the witness and there were no more questions.]

According to the initial medical report, dated December 17, 1991, Dr. V's office projected that the respondent could return to full-time work within 30-60 days. Thus, to the extent that the respondent's testimony identifies the doctor's report as the basis for not returning to work, by the time of the contested case hearing this "report" indicated that respondent should have been ready to return to work. The sixtieth day after the date of the report was February 15, 1992. Up to this point, there is sufficient probative evidence of a causal connection between the inability to work at wages equivalent to the preinjury wage, and the compensable injuries.

However, we find that the evidence of disability for the period after this time is so

[3] Italicized portion on tape of hearing, not in transcript.

weak that a verdict of disability as set forth in Conclusion of Law No. 4 is against the great weight and preponderance of the evidence, and an order to the appellant to pay temporary income benefits after this date is clearly wrong and manifestly unjust, based upon the quality of evidence in this record.

Notwithstanding the conclusion of the hearing officer that both knees and her back caused disability, the respondent disclaimed injury to one knee at all, and did not claim any pain or inability to function as related to her back. Further, the ankle, knee, and leg pain testified about were intermittent by the date of the hearing. While we acknowledge that there is no requirement in the law to search for employment, the fact that respondent has not done so based upon the doctor's report (which projects readiness for full-time employment within 60 days), that respondent fears that she might "begin" to hurt if she did go back to work, and her testimony that pain experienced at the time of the hearing is off-and-on, preponderate against the finding of a "disability" by the time of the contested case hearing. The hearing officer's finding of an injury to her left knee when no such injury is even claimed by respondent indicates an inappropriate weighing of the evidence.

In holding that the evidence *in this case* is so weak to support a finding of disability between February 15, 1992 and March 20, 1992, we are not saying that the testimony of a claimant alone is insufficient to support a finding of disability. We are saying that here, the respondent has not met her burden of proving disability for a period after February 15, 1992.

Accordingly, we reverse the hearing officer's conclusion of law no. 4 and her order only to the extent that it awards temporary income benefits for a period of time after February 15, 1992, and render a decision that medical benefits, and temporary income benefits from the date of injury through February 15, 1992, be paid to respondent. The decision of the hearing officer is affirmed in all other respects.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge